Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

KIM IANN MANNING,
Petitioner,

v.

AMERICAN REPUBLIC INSURANCE CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a ERISA plan administrator's decision is an abuse of discretion when the administrator disregards a treating doctor's opinion based on a claim that the opinion is not supported by objective medical evidence and makes a decision without seeking a contrary doctor's opinion.

Whether a plan administrator retaliates against an employee seeking short-term disability benefits under an ERISA plan when the administrator requires the employee to either have the physician certifying her disability find that she is able to work or lose her job.

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The Petitioner, Kim Iann Manning, respectfully petitions for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 604 F.3d 1030 and is reproduced in the Appendix (App.) herein at 1a. The decision for the U.S. District Court for the Southern District of Iowa is reported at 630 F.Supp.2d 1017 and is reproduced in the Appendix at 26a.

JURISDICTION

The judgment of the court of appeals was issued on May 12, 2010. App. 24a. Petitioner's timely petition for rehearing en banc was denied on June 17, 2010. App. 53a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 29 U.S.C. § 1132(a)(1)(B) state:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought
>
> **(1)** by a participant or beneficiary

> **(A)** for the relief provided for in subsection (c) of this section, or
>
> **(B)** to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

The relevant provisions of 29 U.S.C. § 1140 state:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans

> Disclosure Act. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this chapter or for giving information or testifying in any inquiry or proceeding relating to this chapter before Congress. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT

Factual Background

The basic facts of the claim demonstrate that Manning began employment with ARIC on January 31, 2005. (Court of Appeals Appendix "CAA" 248). Her supervisor considered her a hard worker with a good attitude. (CAA 478). The last day of Manning's active employment at ARIC was April 26, 2005. (CAA 248). Manning sought short-term disability beginning in May, 2005.

ARIC sponsors and administers a Short-Term Disability Plan for its employees. (CAA 74, 86). The process for obtaining approval for that short-term disability took numerous months, during which time Manning and ARIC conferred numerous times. (CAA 141, 207, 212).

Manning provided ARIC a Certification of Health Care Provider form completed by Andra Kennedy, PA dated May 5, 2005. (CAA 88). Kennedy

indicated that Manning was experiencing "elevated blood pressure," "increased frequency of migraines," and "increased anxiety." (CAA 88). Kennedy utilized the form in selecting that Manning's condition was a Chronic Condition Requiring Treatment. (CAA 88). This serious health condition included in its definition "(3) May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.)." (CAA 91). Incapacity, as it pertains to the certification form utilized by Andra Kennedy, is defined to mean "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore or recovery therefrom." (CAA 89). Kennedy additionally stated that there may be a possible continuation of the need for Short Term Disability for an additional 3-6 months depending upon periodic review. (CAA 89).

On May 12, 2005, ARIC requested from Manning additional information as to the "multiple issues" discussed in Kennedy's certification as well as to why Manning could not work. (CAA 93). Kennedy provided an additional note to ARIC on May 12, 2005. (CAA 94). In this note she clarified Manning was suffering from dangerously high blood pressure as well as increased frequency, severity, and duration of migraines. (CAA 94). Kennedy additionally explained that situational stress in the workplace would exacerbate her condition. (CAA 94).

On May 19, 2005, Jodi Lanphier, the HR employee investigating Manning's STD claim, sent a priority message to Craig Leaming, Manning's supervisor at ARIC, requesting he verify Manning's

timecards and let her know if Kim had worked on various of days. (CAA 110). Under the Short Term Disability Policy, an employee who is terminated is no longer entitled to STD benefits. (CAA 78). On May 24, 2005, Leaming responded to the message, verifying Manning's time and excusing Manning's absences from work up to the most recent date requested by Lanphier, May 20, 2005. (CAA 110).

On May 24, 2005, Lanphier sent a letter to Manning regarding her "Request for STD." (CAA 106). In this letter Lanphier, for the first time, informed Manning that ARIC's interpretation of the STD Policy did not permit a certification by a Physician's Assistant. (CAA 106). In addition, and contrary to Leaming's communication with her of the same date, Lanphier informed Manning that, as she was not qualified for FMLA, her absences were being counted as occurrences as they relate to the ARIC Attendance Policy. (CAA 107; CAA 457-458). Lastly, Lanphier informed Manning that ARIC needed her to execute an "Authorization for Release Information" and that ARIC would need to review Manning's medical records before it could make a determination. (CAA 106). Manning was told she had 15 days to comply with these additional requirements or her application would be denied as incomplete. (CAA 106).

Manning executed the Authorization on June 2, 2005. (CAA 132). There is no evidence of ARIC utilizing the June 6, 2005 release to obtain the medical records or other information Manning had authorized them to receive and they had stated they would request. (CAA 106).

On June 10, 2005, Iowa Health faxed an additional letter from Kennedy to ARIC providing her opinion as to the origin and status of Manning's disability. (CAA 133). Kennedy provided her office note from Manning's April 26, 2005 and March 11, 2005 visits and the findings therein as well, as way of explanation of the Objective Complaints, Assessment, and Plan with regard to Manning's disability as discussed in her letter. (CAA 134-135).

On June 16, 2005, Gina Vernon contacted Dr. Kenneth Moon to request a brief phone conversation regarding the health status of Manning. (CAA 138). In her letter, Vernon informs Moon that as a result of Manning's ineligibility for FMLA leave, her continued employment with ARIC was in question. (CAA 138). In addition, Vernon provided Moon with a job description of Manning's position to aid him in determining Manning's capacity to perform her job functions, as well as any reasonable accommodations. (CAA 139-141).

On July 6, 2005, and in response to Lanphier's letter of May 24, 2005, requesting additional medical information, Kennedy again reviewed the medical documentation of Manning's disability, her assessment of Manning's current status, and expectation of Manning's return to full work capacity. (CAA 144-145).

On July 25, 2005, Vernon again wrote a letter to Dr. Moon requesting a phone conversation regarding Manning's condition. (CAA 151). In her letter Vernon stated, "Please note, that your patient's continued employment is dependent upon us receiving clarification of her condition from you."

(CAA 151). She included her previous letter as well as Manning's job description. (CAA 151).

On July 29, 2005, a phone conference was had with Dr. Moon. (CAA 159-160). Dr. Moon referred to and adopted the notes of Kennedy during this discussion. (CAA 159-160). In addition, he stated he would need to see her again to determine if she is able to return to work and in what capacity. (CAA 159-160).

On July 29, 2009, after the conference with Dr. Moon, an additional phone call was made to Manning. (CAA 160). In this conversation she was told she must have an additional appointment with Dr. Moon in order to continue her STD plan or ARIC would terminate her employment. (CAA 160). Manning was informed that if she was willing to leave her STD claim as it stands and return to work next week, she would not need to go see Dr. Moon. (CAA 160). Manning scheduled and attended an appointment with Dr. Moon on August 1, 2005 at 1:00 p.m. (CAA 164).

In his note of August 1, 2005, Dr. Moon determined to keep Manning off of work "until sometime in September." (CAA 183). In addition he stated "[a]t the insurance company's request, I will be happy to participate in another conference call." (CAA 183). ARIC never again set up a follow up phone conference with Dr. Moon (CAA 440). They did not do so as it was too far along in the process and they didn't want to continue to look into something they felt was more of the same. (CAA 441).

On August 3, 2005 at 12:38 p.m. a new Authorization to Release Information form was faxed

to Manning for the purpose of obtaining her medical records. (CAA 170). Manning returned the new Authorization to Release Information the same day at 12:56 p.m. (CAA 174-175).

Additionally, a fax cover was prepared to Dr. Moon requesting he fill out a Certification of Health Care Provider form for his August 1, 2005 visit with Kim Manning. This fax stated "Please complete and fax this form back to us at (515) 247-2493 by Friday, August 5 in order to make a determination *against* Ms. Manning's STD eligibility." (CAA 164). (Emphasis added). This fax was transmitted to Dr. Moon's office at 12:40 p.m. on August 3, 2005. (CAA 169). At 2:30 p.m. on August 3, 2005 another fax was sent to Dr. Moon with the Authorization requesting he provide Manning's medical records dating back to January 31, 2005. (CAA 176).

On Saturday, August 6, 2005, Dr. Moon faxed his notes from the August 1, 2005 appointment with Manning as well as a completed certification, continuing Manning's disability. (CAA 182-186). In his certification, Moon determined that as a result of hypertension and migraines, Manning had a serious health condition and, through the form, stated this was an "Absence Plus Treatment" condition. (CAA 184-186). "Absence Plus Treatment" was a period of incapacity, as previously defined above, lasting more than three consecutive calendar days. (CAA 184-186). It included treatment two or more times and treatment by a health care provider on at least one occasion which results in a continuing regimen of treatment under supervision of a provider. (CAA 184-186). Dr. Moon anticipated, per Andra Kennedy's notes, a return to full duty in September.

(CAA 184). Additionally, he stated that Manning was unable to perform work of any kind. (CAA 185).

On August 8, 2005, Vernon sent a letter to Manning denying her claim for STD disability and requiring her to return to work on August 15, 2005. (CAA 181). Vernon informed Manning that if she failed to return to work on that date, "American Republic's records will be noted to reflect that you have abandoned your position with American Republic...". (CAA 181). Vernon did not require Manning to obtain a release to work from her Approved Health Care Provider. (CAA 181).

On August 12, 2005, Manning appealed the decision denying her short-term disability. (CAA 195). The individual assigned to review the claim on appeal was Patricia Anderson. (CAA 206-207).

On August 15, 2005, Manning returned to work. (CAA 189). She did not have a release to return to work from her physician. (CAA 283-284). The letter ordering her to return to work did not impose that requirement. (AR 108, JA 181). She was sent home. (CAA 478).

Patricia Anderson reviewed the claim file and determined to affirm the denial of short-term disability. (CAA 206). On August 29, 2005, Patricia Anderson authored the appeal denial letter, which was faxed to Manning on August 30, 2005. (CAA 206).

While the appeal denial letter denied short-term disability benefits, it also ordered Manning to return to work. (CAA 206-207). This order to return to work specifically required Manning, when she returned to work, to obtain a release to return to work from her Approved Health Care Provider, here

Dr. Kenneth Moon. (CAA 206-207). The letter stated, in part:

> Because your claim has been denied, you have two options as follows:
>
> 1. Return to work on Wednesday, August 30[1], with certification from your approved Health Care Provider that you are able to return to work.
> 2. Provide us with *objective* medical information, from your approved Health Care Provider, that you are disabled from performing your job duties.
>
> (CAA 206). (emphasis in original)

Patricia Anderson stated that the return to work was required to be from her Approved Health Care Provider, Dr. Moon. (CAA 425, 443). She stated that ARIC required the return to work pursuant to a provision in the short-term disability policy that provided as follows:

> A document completed and signed by your Approved Health Care Provider authorizing your release to return to work must be submitted to the enterprise's Human Resources Department (Benefit Specialist) prior to your return to work date following a

[1] This reference to August 30 is in error. Wednesday, August 31 was the correct date.

> leave due to a Medically Certified Health Condition. Also, you must notify your direct leader of your return date.
>
> (CAA 445).

Pursuant to this provision Manning was required to be released to work by Dr. Moon, the physician who had certified her condition and was supervising her treatment. (CAA 425, 443). However, this policy did not apply as Manning had not been allowed short-term disability and, therefore, had no Medically Certified Health Condition. (CAA 445).

No adequate explanation was given as to why a return to work release was demanded when ARIC had determined that the medical evidence allegedly did not justify her being off work for disability nor as to why a return to work release was demanded from Dr. Moon rather than from a company doctor or some other medical provider. Rather, Defendant has argued instead that a purported unwritten policy existed. (Tr. at 34:1-19). No such policy has been evidenced or provided in this case.

Upon receiving this letter on August 30, 2005, Manning did attempt to go to her Approved Health Care Provider. (CAA 202). However, Dr. Moon was already gone for the day. (CAA 202). She notified ARIC that she set an appointment for the morning of August 31, 2005, to see Dr. Moon, her Approved Health Care Provider. (CAA 200, 202).

Manning went to see Dr. Moon on August 31, 2005, who did not release her to return to work, but

rather extended her leave for an additional month. (CAA 291-292); (CAA 296). Without a release to return to work, Manning was not able to return to work. (CAA 206). Per the letter of Patricia Anderson dated August 29, 2005, Manning's employment was terminated effective August 31, 2005. (CAA 206-207).

On September 6, 2005, ARIC sent a letter to Manning confirming the termination of her employment. (CAA 384). This termination letter again confirmed that Manning, before being allowed to return to work, was required to obtain from her Approved Health Care Provider, a release to return to work. (CAA 384).

Eighth Circuit Court of Appeals Decision

The Court of Appeals found that the plan administrator did not abuse its discretion in ignoring the opinions of Dr. Moon. (App. 11a-14a). The Court determined that Dr. Moon's opinion did not sufficiently address the nature, duration or basis for Manning's disability. (App. 14a). The Court found that Dr. Moon's opinion that Manning was not able to return to work in August 2005 was not objective medical evidence. (App. 13a). This finding ignores the fact that the definition of objective medical evidence includes data and records from your attending Approved Health Care Provider. (App. 12a). The decision characterizes Dr. Moon's stated opinion that Manning was unable to perform work of any kind as "conclusory" and therefore without any merit. (App. 13a).

The Court of Appeals also determined that the plan administrator's decision to ignore Dr. Moon's opinions without the benefit of an independent medical examination did not constitute a procedural irregularity. (App. 14a-15a). The decision is based on the Court of Appeals characterization of Dr. Moon's opinion as "subjective." (App. 16a). This characterization is based on the decision that stating a patient is physically unable to perform work of any kind is a subjective statement. (App. 14a). The Court found that a doctor's opinion that does not provide explanation of that answer. (App. 14a).

Next, the Court of Appeals found that summary judgment was appropriate on the ERISA Retaliation and Interference claims. (App. 18a). The Court determined that there was no direct evidence of retaliation. (App. 19a).It concluded that requiring Manning to get a certification to return to work from the same health provider that found her disabled would not be a Hobson's choice. (App. 19a-20a). In rendering the decision the Court simply read out the evidence that proposed certification to return to work must have come from the same medical provider that diagnosed her with a disabling condition. (App. 21a-22a). The Court relied upon the same finding to support its decision that Manning could not satisfy the requirements of the *McDonnell Douglas* burden shifting analysis. (App. 21a-22a).

Finally, the Court of Appeals determined that Manning could not support her claim for long-term disability benefits. (App. 22a-23a). The Court reasoned that Manning would not qualify for long term benefits because she could not satisfy the

requirement that she was short term disabled. (App. 22a-23a). In doing so, the Court characterized Manning's disability as four months of absenteeism. (App. 22a-23a).

REASONS FOR GRANTING THE WRIT

The Short Term Disability Question

In this matter, ARIC substituted its judgment and interpretation of Manning's condition for that of the treating physician as a result of its layperson understanding of the objective and subjective evidence in the medical records. Indeed, the Circuit's decision falls into the same dangerous precedent by this allowance in its characterization and analysis of the objective evidence in contradiction with the opinions of Dr. Moon. (App. 13a).

Clearly, if ARIC was dissatisfied with Dr. Moon's explanation and interpretation of the condition of Manning, as evidenced by both objective and subjective evaluation, it could request another opinion in the form of an independent medical examination. By not so doing, a treating physician's opinion, specifically requested by ARIC, was disregarded with no evidence contradicting it. In addition, ARIC had the option of speaking further with Dr. Moon after his certification for any explanation and elected not do so, instead issuing a decision denying benefits with no reasoning given on August 8, 2005.

The Court of Appeals decision is in opposition to United States Supreme Court precedent. By

allowing the disregard of a treating physician's opinion, through characterization of the evidence as a lack of objective medical evidence of disabling signs or symptoms, the decision of the panel is at odds with Supreme Court precedent in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003). In that case, the Supreme Court stated "Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." *Id.* at 834. Allowing a plan administrator to avoid this language simply by characterizing the evidence as not sufficient "objective medical information" allows arbitrary refusal of treating doctors' opinions.

The Court of Appeals decision also creates a circuit split concerning the need to use actual evidence to rebut a treating physician's opinion. In *Gannon v. Metro Life Ins. Co.*, 360 F.3d 211, 215-216 (1st Cir. 2004) the Court explained that courts may not impose on plan administrators a "discrete burden of explanation *when they credit reliable evidence that conflicts with a treating physician's evaluation.*") (emphasis added) *Gannon* at 215-216. *See also Leahy v. Raytheon Co.*, 315 F.3d 11, 23-24 (1st Cir. 2002) (stating that a treating physician's opinion that a claimant is totally disabled may be *rebutted by other evidence.*) (emphasis added). The Eleventh Circuit has come to the same conclusion. *Helms v. General Dynamics Corp.*, 222 Fed. Appx. 821, 832 (11th Cir. 2007) (stating *Nord* instructs the courts that they may not impose on plan administrators "a discrete burden of explanation *when they credit reliable evidence that conflicts with a treating physician's evaluation."* (emphasis added).

Similarly, in *Calvert v. Firstar Financial, Inc.*, 409 F.3d 286, 295 (6th Cir. 2005) the Sixth Circuit concluded that "a plan administrator may not arbitrarily disregard the medical evidence proffered by the claimant, including the opinions of her treating physicians." *Calvert* at 295. In *Calvert*, the Court held that a plan administrator acted arbitrarily in relying on a file review as opposed to the objectively verifiable determinations of the Social Security Administration and claimant's treating physician. *Id.* The Ninth Circuit reached a similar decision under similar circumstances in *Jordan v. Northrop Grumman Corp.*, 370 F.3d 869 (9th Cir. 2004). ("If the administrator's decision is arbitrary, as where the administrator arbitrarily refuses to credit a claimant's reliable evidence, the administrator's decision fails the "fair review" requirement of the statute.").

The type of credible evidence necessary in this circumstance would be a qualified physician's opinion that Manning was not disabled. The evidence shows that the plan administrator had the ability to request an independent medical examination. Disregarding a physician's opinion, and thereby endangering the life and health of an employee, should not be a decision left to lay persons and their interpretation of medical evidence. The plan administrator had before it the ability to make an informed decision and decided to avoid the time and expense of doing so.

The decision of the Court of Appeals threatens to render meaningless ERISA evaluation of disability claims, as layperson administrators would no longer need to obtain evidence to support their

denial of disability benefits. Instead they could choose to state that the evidence relied upon by certifying physician's is insufficient to meet their standard of objective medical information. The Court should grant the writ of certiorari and issue opinion consistent with the precedent.

The Retaliation Claim

The decision of the Court of Appeals allowed the *post-hoc* implementation of a requirement on an unsuccessful disability applicant to obtain from her treating physician a release to return to work or face termination. Such decision is a matter of exceeding importance, as it allows claimants to be subjected to an essential Hobson's choice, wherein they must choose to discredit their claim for benefits or face termination.

ARIC required in its denial of Manning's appeal, a medical release from Manning's approved Health Care Provider, Dr. Moon, before she could return to work. This was by its very nature was a requirement that Manning forgo her present and any further claim to entitlement to STD; (CAA 206; CAA 425). ARIC claimed this requirement is supported by a written policy that does not require this work release from Manning; (CAA 445); and ARIC has now, *post-hoc*, claimed that it had this requirement as to Manning in order to avoid any claim in the future that the medical condition may worsen as a result of her return to work and cause liability for the company. (CAA 443).

This claim flies in the face that ARIC did not require Manning to seek a return to work after the

first denial of benefits. Manning could have returned to work without any release at all. Yet, the second time ARIC denies Manning, when it was apparent Manning was willing to continue the claim beyond the bounds of ARIC, the company required a release to return to work from the very medical provider that certified her unable to work. If ARIC really had such a policy it would have been implemented in the first letter denying benefits. If ARIC has some explanation as to the omission in the first letter then there is a genuine issue of material fact that only a jury can resolve.

ARIC's second denial letter presented to Manning the "Hobson's choice" referred to by the Circuit Courts in *Lindemann v. Mobil Oil Corporation,* 141 F.3d 290 (7th Cir. 1998) and *Kowalski v. L & F Products,* 82 F.3d 1283 (3d Cir. 1996). Manning contends this is a "Hobson's choice" because Manning was put into the position to choose between giving up on her attempt to obtain her short-term disability through the processing of this judicial review proceeding or to give up her job. Additionally, Manning had to figure out how she was to get her Approved Health Care Provider to release her to work when that very Approved Health Care Provider had certified she was not capable to return to work. (CAA 183).

Here, the Court will note that Manning had no options. She could not return to work against medical advice, since ARIC was requiring a return to work release from Dr. Moon. (CAA 206). Further, Manning was not allowed to go to another health care provider to get a release, as Anderson required the release be from her Approved Health Care

Provider and treating physician, Dr. Moon. (CAA 425). Her only option, in order to be able to return to work, was to get a return to work release from the very health care provider who had been certifying, and continued to certify her, as unable to work. This requirement was not supported by any written policy of ARIC and only placed upon Manning after her appeal of the initial STD decision. The requirement, by its very nature, required Manning to obtain a medical document that vitiated any previous or further certification by the certifying doctor that Manning was disabled and, thereby, extinguished Manning's continued claim for short-term disability benefits. That would certainly make a mockery of any attempt to engage in further legislatively protected rights to attempt to seek recovery of the benefits, or retaliation, by a proceeding in Court. As this Court has stated in prior occasions, when an employee is presented with a situation by its employer that it must choose between his or her job and her rights, the employer has interfered with those rights. *Sheet Metal Workers' Intern. Ass'n v. Lynn*, 488 U.S. 347, 109 S. Ct. 639, 644 (1989) (citing *Finnegan v. Leu*, 456 U.S. 431, 102 S. Ct. 1867, 1873 (1982).

The actions of the administrator are particularly worrisome as the administrator was acting in a conflicted position as Manning's employer. Therefore, utilization of this requirement, upon determination that Manning was not eligible for STD, placed Manning in a particularly precarious position and was directly linked to her pursuit of her employee benefits. This Court should review the Court of Appeals determination that such a

requirement was not illegitimate, as it presents a matter of exceeding importance in its implications to future employees pursuing their ERISA rights.

The Long Term Disability Claim

The question of Manning's long term disability benefits is integrally intertwined with the short term decision and retaliation decisions rendered above. Any reversal on those issues would have a profound impact on the finding that Manning was not eligible for long term benefits.

Manning alleges that the conduct of ARIC prevented her from obtaining her future rights to benefits under the long term disability policy of ARIC. Manning, as can be seen from the administrative record, was suffering from a combination of illnesses that her Approved Health Care Provider had certified caused her to need time off from work. (CAA 182-186). Though ARIC declined to approve short-term disability for this combination of illnesses, it cannot be disputed that one such illness was high blood pressure. (CAA 184). As a result of the conduct of ARIC, Manning was terminated. Thereafter, Manning developed congestive heart failure and is now totally disabled and receiving Social Security Disability benefits. (JA 226).

It is agreed by the parties that Manning never got to the point, before being terminated, where she either applied for or qualified to apply for long term disability. That is merely because she was terminated before she got to that point. She cannot be an "active employee" to qualify for long term

disability if she has been wrongly terminated during the application process for short-term disability. She cannot apply for long term disability if she is wrongly terminated for having applied for and sought short-term disability.

Be that as it may, the conduct of ARIC is causally related to and demonstrative of intent to prevent Manning from obtaining her long term disability benefit payments. Anderson acted to require a return to work release. (CAA 206). Anderson required the release even though there is no policy that requires it in a short-term disability claim denied situation, so that she could prevent Manning from returning to work and later potentially suffering a serious exacerbation as a result of her return. (CAA 443). This evinces a specific motive to punish a person who has sought short-term disability benefits and to attempt to prevent the acquisition of both past and future disability benefits. This is direct evidence of an improper motive which entitles Manning to relief. At the very least it raises a genuine issue of material fact. As such this issue, at the least, is contested and it was error for the Court of Appeals to grant ARIC summary judgment on this claim.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted
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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-2625

Kim Iann Manning,	*	
	*	
Plaintiff- Appellant,	*	
	*	
v.	*	Appeal from the
	*	United States District
American Republic	*	Court for the
Insurance Company,	*	Southern District of
	*	Iowa.
Defendant-Appellee.	*	

Submitted: January 14, 2010
Filed: May 12, 2010

Before GRUENDER and SHEPHERD, Circuit Judges, and LANGE,[1] District Judge.

LANGE, District Judge.

Kim Iann Manning ("Manning") was denied short-term disability benefits and subsequently terminated from employment by American Republic Insurance Company ("ARIC"). She sought judicial review of the benefits decision under the Employee Retirement Income Security Act. 29 U.S.C. § 1132 *et*

[1] The Honorable Roberto A. Lange, United States District Court for the District of South Dakota, sitting by designation.

seq. She also asserted ERISA retaliation and interference claims. The district court[2] affirmed ARIC's denial of Manning's benefits claim, finding that ARIC did not abuse its discretion in determining that Manning was not disabled. In a separate order, the district court granted ARIC's motion for summary judgment on Manning's ERISA retaliation and interference claims. Manning appeals both orders. Having jurisdiction under 28U.S.C. § 1391, this Court affirms.

I. MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE.

Beginning on January 31, 2005, Manning worked for ARIC as a Senior Account Specialist. Her job involved selling insurance products over the telephone and was sedentary in nature, consisting of calling prospective customers and determining their eligibility for insurance, providing insurance quotes, and data entry. Manning worked a total of 50 days for ARIC. Her last day worked was April 26, 2005.

ARIC sponsored and administered a self-funded short-term disability plan ("the Plan") for its employees. As an ARIC employee, Manning was eligible to participate in the Plan. To qualify for short-term disability benefits under the Plan, eligible employees must: (1) be covered by the Plan; (2) be under the care of an "Approved Health Care Provider"; (3) have a "Medically Certified Health Condition" that lasts longer than the short-term

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[2] The Honorable James Gritzner, United States District Judge for the Southern District of Iowa.

disability waiting period; (4) receive appropriate care and treatment for the Medically Certified Health Condition; and (5) receive approval of short-term disability benefits in accordance with the provisions of the Plan. Under the Plan, ARIC reserved the right to have claimants submit to an Independent Medical Examination ("IME") by an Approved Health Care Provider of its choice.

The Plan defines Approved Health Care Provider as: (1) licensed doctors of medicine or osteopathy; (2) licensed podiatrists, dentists, Ph.D.'s, psychologists, optometrists, or chiropractors; and (3) licensed nurse practitioners or nurse midwives. The Plan's definition of Medically Certified Health Condition required the condition to be "[d]ocumented by objective disabling signs and symptoms."

On May 9, 2005, Manning submitted a claim for benefits under the Plan by providing a Family Medical Leave Act Certification of Health Care Provider form completed by Physician Assistant Andra Kennedy dated May 5, 2005. Kennedy reported that Manning was experiencing "elevated blood pressure," "increased frequency of migraines," and "increased anxiety." Kennedy also wrote that Manning's conditions began approximately 90 days earlier. Kennedy recommended that Manning receive short-term disability benefits for two to three months. Kennedy failed to directly answer a question on the form asking whether Manning was "unable to perform work of any kind," instead indicating that Manning should "avoid long periods of sitting or repetitive motion."

On May 12, 2005, Jodi Lanphier, an ARIC benefit specialist, called Manning to request more information regarding her claim. Lanphier told Manning that ARIC needed Manning to specify why she was unable to work. In response, Manning faxed Lanphier a document the next day, signed by Kennedy, stating "dangerously high blood pressure," "[i]ncrease in frequency, severity, and duration of migraines," and "hypertension." However, the note did not explain why those conditions prevented Manning from working for an extended period.

On May 20, 2005, Lanphier again called Manning for more information in order to process her claim. Lanphier sent Manning a letter on May 24, 2005, explaining that the Plan required claims to be completed by an Approved Health Care Provider. The letter set forth in full the Plan's definition of Approved Health Care Provider, which did not include physician assistants. The letter further notified Manning that her claim could not be considered until an Approved Health Care Provider submitted evidence of disability. The letter also explained that "[a] decision on STD eligibility will not be made until objective medical evidence to support your disability is received by the company." Finally, Lanphier wrote that, consistent with the Plan's terms, Manning had fifteen days after receipt of the letter to submit the required information to ARIC.

On June 8, 2005, Kennedy sent ARIC a handwritten letter, attaching two medical records from office visits during which Manning was examined by Dr. Kenneth Moon. The first record,

from March 11, 2005, noted that Manning's blood pressure was 148/110, that "she feels the best that she has felt in a long time," and that she could return to work the following Monday. In the second record, from April 26, 2005, Kennedy reported that Manning's blood pressure was 152/100 and that Manning felt "stressed out."

On June 16, 2005, ARIC Senior Human Resources Business Partner Gina Moeckly Vernon sent a letter to Dr. Moon requesting a telephone conversation regarding Manning's health status. Vernon attached a copy of ARIC's job description for Manning's position. On July 19, Vernon, Lanphier, and Manning participated in a conference call, during which Vernon advised Manning that she needed to speak with Dr. Moon regarding Manning's medical condition. Vernon also explained that, under the Plan's terms, ARIC could not make a determination as to Manning's claim without documentation from an Approved Health Care Provider. On July 25, Vernon sent a second letter to Dr. Moon - with a copy to Manning - requesting a telephone conference regarding Manning's claim.

On July 29, 2005, Vernon, Lanphier, and Dr. Moon participated in a teleconference to discuss Manning's condition. Dr. Moon explained that he had not examined Manning since March 2005, but that upon examination of Kennedy's records and notes, he found that Manning's blood pressure level did not require placement on disability status. Inconsistent with this statement, however, Dr. Moon said that he believed Manning would not be able to return to work due to her blood pressure and

migraines. He then said that he was not able to determine Manning's eligibility to return to work at that time, and he would require further examination to make a disability determination.

On August 6, 2005, Dr. Moon returned to ARIC a completed Certification of Health Care Provider form and notes from an August 1, 2005 examination of Manning. On the form, Dr. Moon noted that Manning had been under stress from her bankruptcy, but that the stress would likely be lifted upon the upcoming completion of the bankruptcy proceedings around September 4, 2005. He also reported that Manning's blood pressure was improving and her migraines were becoming less frequent. In response to the certification form's question, "is the employee unable to perform work of any kind," Dr. Moon answered "yes" without any explanation.

On August 8, 2005, Vernon sent Manning a letter denying her short-term disability claim. Manning appealed the determination, but she did not provide ARIC any additional information regarding her medical status. On August 29, 2005, ARIC upheld the decision denying Manning's claim and sent Manning a letter stating that it had reviewed the contents of her medical file and was upholding denial of the claim "due to lack of objective medical information that illustrates that you are disabled from performing your job duties, as defined by American Republic's Short Term Disability Plan."

Within the denial letter, ARIC informed Manning that because her claim had been denied, she had the following two options: (1) "Return to work on Wednesday, August 30, with certification from your Approved Health Care Provider that you are able to return to work"; or (2) "Provide us with *objective* medical information, from your Approved Health Care Provider, that you are disabled from performing your job duties." (emphasis in original). ARIC purportedly required certification of ability to return to work as part of an internal policy to shield itself from liability by ensuring that employees do not risk their health or aggravate an injury by returning to work for financial reasons.

The letter also warned Manning that ARIC expected her employment would be terminated if she failed to return to work on August 31, 2005. Manning did not return to work. ARIC terminated her employment on September 6, 2005, which was communicated to Manning through a letter stating in part:

> Because your absence is not covered by FMLA, you failed to provide objective medical information that you are disabled from performing your job duties as required by our Short-Term Disability Plan, and you have not returned to active status, your employment with American Republic is being terminated effective August 31, 2005.

Manning was ultimately released by her doctor to return to work in October 2005. She never applied for long-term disability benefits from ARIC and, even had she remained employed with ARIC, she would not have been eligible for long-term disability benefits because the six-month short-term disability period would not have expired by October 2005. After exhausting her administrative remedies, Manning filed a complaint on May 17, 2007, bringing claims for: (1) judicial review of ARIC's denial of her short-term disability benefits under ERISA, pursuant to 29 U.S.C. § 1132(a)(1)(B); (2) an ERISA retaliation claim asserting ARIC terminated Manning based on her application for short-term disability benefits, pursuant to 29 U.S.C § 1140; and (3) an ERISA interference claim that ARIC's wrongful termination prevented Manning from obtaining future rights and benefits under ARIC's long-term disability benefits plan. Finding that ARIC did not abuse its discretion and that its decision to deny benefits was supported by substantial evidence, the district court affirmed ARIC's decision on February 24, 2009. On June 19, 2009, the district court granted summary judgment to ARIC on Manning's ERISA retaliation and interference claims. Manning appealed

II. STANDARD OF REVIEW.

We review de novo the district court's grant of summary judgment regarding an ERISA plan administrator's benefits determination. *Wakkinen v. UNUM Life Ins.Co. of America*, 531 F.3d 575, 580 (8th Cir. 2008). Summary judgment is appropriate if there are no disputed issues of material fact and the

moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Aviation Charter, Inc. v. AviationResearch Group/US*, 416 F.3d 864, 868 (8th Cir. 2005). We view the evidence and inferences that may reasonably be drawn from the evidence in the light most favorable to the nonmovant. *Id.*

When a plan reserves "discretionary power to construe uncertain terms or to make eligibility determinations . . . the administrator's decision is reviewed only for 'abuse . . . of his discretion'" by the district court. *King v. Hartford Life & AccidentIns. Co.*, 414 F.3d 994, 998-99 (8th Cir. 2005) (en banc) (quoting *Firestone Tire &Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)); *see also Conkright v. Frommert*, No.08-810, 559 U.S. (slip. op., at 5) (Apr. 21, 2010) (following Firestone and noting that Firestone established a "broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions"). Under the abuse of discretion standard, the court must affirm the plan administrator's interpretation of the plan unless it is arbitrary and capricious. *Midgett v. Wash. Group Int'l Long Term Disability Plan*, 561 F.3d 887. 896-97 (8th Cir. 2009).

To determine whether a plan administrator's decision was arbitrary and capricious, the court examines whether the decision was "reasonable." *King*, 414 F.3dat 998-99. Any reasonable decision will stand, even if the court would interpret the language differently as an original matter. *Id.*; *see also Rutledge v. Liberty Life Assurance Co.*, 481 F.3d 655, 659 (8th Cir. 2007) ("[W]e must affirm if a reasonable person could have reached a similar

decision, given the evidence before him, not that a reasonable person would have reached that decision."); *Midgett*, 561 F.3d at 897. However, this standard does not apply if the plan administrator has committed "a serious procedural irregularity" causing "a serious breach of the plan administrator's fiduciary duty to the claimant," in which case the court applies a less deferential standard of review. *Pralutsky v. Metro. Life Ins. Co.*, 435 F.3d 833, 837 (8th Cir.2006) (internal citations omitted).

A conflict of interest exists when a plan administrator holds the dual role of evaluating and paying benefits claims, such as when the employer both determines eligibility for benefits and pays the benefits. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct.2343, 2346 (2008). If such a conflict exists, then a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits. The significance of this factor depends on the circumstances of the particular case. Id. When an insurer has a history of biased claims administration, the conflict "may be given substantial weight." Id. When an insurer has taken steps to reduce the risk that the conflict will affect eligibility determinations, the conflict "should be given much less weight." *Id.*

Here, ARIC was both the evaluator of whether benefits were owed and the entity responsible for paying those benefits. The record contains evidence of neither biased claims administration nor efforts to reduce the risk of such administration. Accordingly, like in *Darvell v. Life Ins. Co. of North America*, 597

F.3d 929, 934 (8thCir. 2010), the court gives the conflict some weight.

III. DISCUSSION.

A. ARIC's Denial of Short-Term Disability Benefits to Manning was Reasonable.

The Plan stated that the Administrator "retains the sole right to interpret and construe the terms of the STD policy and to make the final determination of the validity of each claim and the length of time for which payments, if any, shall be made." Because the Plan vested the Administrator with discretionary authority to determine eligibility for benefits and to construe the terms of the Plan, this Court reviews ARIC's decision denying Manning's benefits claims for an abuse of discretion. *See Glenn*, 128 S. Ct. at 2350; *King*, 414 F.3d at 998-99. Therefore, ARIC's decision will stand if reasonable. *King*, 414 F.3d at 998-99.

To qualify for short-term disability benefits, the Plan required Manning to show that she (1) was covered by the Plan; (2) was under the care of an Approved HealthCare Provider; (3) had a Medically Certified Health Condition that lasted longer than the 60 working day waiting period; (4) received appropriate care and treatment for the Medically Certified Health Condition; and (5) received approval of short-term disability benefits in accordance with Plan provisions. ARIC denied Manning's claim due to her failure to establish that she had a Medically Certified Health Condition.

ARIC's decision will stand if it is reasonable, and a decision is reasonable if supported by substantial evidence. *Midgett*, 561 F.3d at 897 (finding that substantial evidence is more than a scintilla but less than a preponderance) (citing *Schatz v. Mutual of Omaha Ins. Co.*, 220 F.3d 944, 949 (8th Cir. 2000)). Substantial evidence supports ARIC's decision because the records submitted to ARIC did not constitute objective medical evidence of disability. Thus, ARIC did not abuse its discretion.

First, the certification and disability opinions of the physician assistant did not satisfy the Plan's requirement that an Approved Health Care Provider certify a health condition. The Plan's unambiguous language required Manning to demonstrate that she had a disabling health condition "as certified by an Approved Health Care Provider." The language of the Plan defined who is an Approved Health Care Provider, and a physician assistant is not an Approved Health Care Provider. Therefore, ARIC reasonably declined to consider Kennedy's opinions.

ARIC provided Manning ample notice of this deficiency in her claim. ARIC repeatedly explained to Manning what the Plan required and notified her that the opinions of a physician assistant were inadequate. Despite these notifications, Manning waited nearly three months to provide ARIC with a certification from an Approved Health Care Provider, Dr. Moon. ARIC did not abuse its discretion in declining to consider the certification or opinions of Kennedy because she was not an Approved Health Care Provider as defined by the Plan.

Manning contends that ARIC abused its discretion in rejecting Dr. Moon's opinion that Manning was disabled. Dr. Moon, after providing inconsistent opinions in a phone conference on July 29, 2005, later offered a conclusory opinion that Manning's hypertension and migraines rendered her to be disabled. However, the Plan required more. Under the Plan, an allegedly disabling medical condition needed to be documented by "objective disabling signs and symptoms."

As explained by Lanphier in a letter to Manning dated May 24, 2005, objective medical evidence includes "data and records from your attending Approved HealthCare Provider, narrative reports, x-rays, and laboratory findings and consulting Approved Health Care Provider reports." The Plan required this information "at the inception of [Manning's] STD claim and periodically thereafter as requested by the enterprise."

Neither Manning nor Dr. Moon submitted objective evidence that Manning was disabled by hypertension. Hypertension can be objectively measured by blood pressure readings. The record contains only four specific blood pressure readings, and only one of the reports characterized Manning's blood pressure as high. This reading occurred on April 26, 2005, during a period in which Manning independently decided to discontinue her blood pressure medication. Manning submitted no other documentation of high blood pressure or any information regarding the intensity or duration of any hypertension. On June 2, 2005, Dr. Moon reported that Manning had a "good" blood pressure

reading that would not warrant placing her on disability status. Additionally, the one blood pressure reading characterized as high was procedurally insufficient to establish her entitlement to benefits. Manning elected a60-business-day waiting period, and the sixtieth business day after Manning's claimed disability onset date of April 27 was in late-July. Even if Manning experienced high blood pressure in April, she presented ARIC with no evidence that this condition continued after the waiting period.

Manning's migraines - and their allegedly debilitating nature - were not documented by objective disabling signs and symptoms either. Her medical records established that her migraines could be controlled with medication. Dr. Moon's reports did not address the nature, duration or severity of the headaches, whether the migraines could be disabling over an extended period of time, or how they could render her unable to perform work of any kind.

In summary, ARIC did not receive objective evidence of disabling signs and symptoms from Dr. Moon. Rather, Dr. Moon provided a subjective opinion, with no explanation regarding how Manning's condition might prevent her from performing her regular job duties, which ARIC had described in writing to Dr. Moon. ARIC reasonably requested Manning to supplement her claim with objective medical evidence of disability, but none was provided. Consequently, ARIC reasonably denied Manning's claim for insufficient evidence of a medically certified health condition.

B. ARIC's Request for Objective Medical Evidence and Decision not to Conduct an Independent Medical Examination did not Constitute a Procedural Irregularity.

Manning contends that ARIC's disregarding of Dr. Moon's opinion without conducting an IME amounted to a procedural irregularity, requiring this court to apply a less deferential standard of review of ARIC's decision. ARIC counters that because Manning provided no objective medical evidence of disability, it was not required to conduct an IME to rebut the opinion prior to denying her claim. Hence, the issue at hand is whether ARIC should have obtained an IME prior to denial of Manning's claim.

Generally, "[i]t is not unreasonable for a plan administrator to deny benefits based upon a lack of objective evidence." *Johnson v. Metro. Life Ins. Co.*, 437 F.3d809, 813 (8th Cir. 2006) (quoting *McGee v. Reliance Standard Life Ins. Co.*, 360 F.3d921, 925 (8th Cir. 2004)); *see also Rutledge v. Liberty Life Assurance Co. of Boston*,481 F.3d 655, 661 (8th Cir. 2007); *Pralutsky*, 435 F.3d at 839-40; *Groves v. Metro. Life Ins. Co.*, 438 F.3d at 875. In *Johnson*, the plan required objective medical evidence of disability, which the claimant argued created a procedural irregularity, justifying a less deferential standard of review than the ordinary abuse of discretion. *Johnson,* 437 F.3d at 813. The court, however, applied the abuse of discretion standard and held that the plan administrator acted reasonably in denying benefits based on its interpretation of the plan language and the absence

of objective evidence of allegedly disabling fibromyalgia. *Id.*

Similar to the facts in Johnson, Manning argues that a less deferential standard of review applies because ARIC arbitrarily decided to require objective medical evidence rather than relying solely on consideration of Dr. Moon's subjective opinion. However, as in *Johnson* and *Pralutsky*, the administrator reasonably interpreted the plan to require objective medical evidence to prove the claimant's disability. ARIC's interpretation requiring objective medical evidence did not constitute a procedural irregularity and does not trigger a less deferential standard of review.

Manning next argues that ARIC abused its discretion by not performing an IME. However, it is not an abuse of an ERISA plan administrator's discretion "to ignore an opinion when the physician did not 'provide reliable objective evidence of testing or other proof to support the finding'" of disability. *Darvell*, 597 F.3d at 935(quoting McGee, 360 F.3d at 924-25). A plan administrator is not required to order an IME when the claimant's evidence is facially insufficient to support a finding of disability. *Rutledge*, 481 F.3d at 661 (8th Cir. 2006) (citing *Layes v. Mead Corp.*, 132F.3d 1246, 1251-52 (8th Cir. 1998)). This case is similar to *Groves*, where a treating physician stated that the claimant "may be able to perform at the sedentary level" and then later said that claimant was "incapable of even the most sedentary occupation."438 F.3d at 875. Because the doctor's opinion provided no reliable objective evidence, such as testing, to support the

finding, this Court found that "[i]t is not unreasonable for a plan administrator to deny benefits based upon a lack of objective evidence. *Id.* (quoting *Pralutsky*, 435 F.3d at 839).

The five factors set out in *Finley v. Special Agents Mut. Benefit Ass'n*, 957F.2d 617, 621 (8th Cir. 1992), guide the Court in determining the reasonableness of a plan administrator's interpretation of a plan. The factors are the following: (1)whether the administrator's language is contrary to the clear language of the plan; (2)whether the interpretation conflicts with the substantive or procedural requirements of ERISA; (3) whether the interpretation renders any language in the plan meaningless or internally inconsistent; (4) whether the interpretation is consistent with the goals of the plan; and (5) whether the administrator has consistently followed the interpretation. *Id.* However, "the dispositive principle remains . . . that where plan fiduciaries have offered a reasonable interpretation of disputed provisions, courts may not replace it with an interpretation of their own - and therefore cannot disturb as an abuse of discretion the challenged benefits determination." *Darvell*, 597 F.3d at 935(citation omitted).

All five *Finley* factors support ARIC's interpretation of the Plan. First, the requirement of objective medical evidence of disability is not only consistent with the language of the Plan, but also is expressly required for short-term disability eligibility. Second, the substantive and procedural requirements of ERISA do not prohibit a plan administrator from asking for a certain quality or

quantity of information from claimants. Third, ARIC's interpretation does not render any language in the plan meaningless or internally inconsistent. Fourth, ARIC's interpretation is consistent with the Plan's goal "to provide [its employees] with income replacement in the event[an employee is] unable to perform some or all of [his or her] job duties due to a Medically Certified Health Condition that extends beyond the STD elimination or waiting period." This goal is consistent with the requirement of requiring objective evidence, as such a requirement will allow only claimants who are unable to perform some or all job duties with income replacement. Finally, Manning submitted no evidence suggesting that ARIC does not require all applicants for short-term benefits to provide objective medical evidence of disability.

C. Summary Judgment was Appropriate on the ERISA Retaliation and Interference Claims.

Section 510 of ERISA makes it unlawful for an employer to discharge a participant in an employee benefit plan "for exercising any right to which he is entitled under the provisions of an employee benefit plan" (retaliation) or "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan" (interference). 29 U.S.C. § 1140. An ERISA-based retaliation or interference claim can be established through direct evidence, or in the absence of direct evidence, through the *McDonnell Douglas* three-part burden-shifting framework common to Title VII and Age Discrimination in Employment Act cases.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1035 n.7 (8th Cir. 2007) (holding because "[plaintiff's]ERISA claim is based on alleged circumstantial evidence . . . [the Court analyzes the claim] under the *McDonnell Douglas* framework.") (citing *Kinkead v. Sw. Bell Tel.Co.*, 49 F.3d 454, 456-57 (8th Cir. 1995). Under this framework, if a claimant is able to establish a prima facie case of a section 510 violation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Rath v.Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992). If the employer does so, then the burden shifts back to the claimant to prove that the proffered reason is pretextual. *Id.* at 1089-90.

Manning provided no direct evidence that ARIC terminated her either in retaliation for making an ERISA benefits claim or in interference with any right to attain future benefits. Manning argues that ARIC's August 29, 2005 letter constitutes direct evidence of a section 510 violation, claiming it presented her with a "Hobson's choice," in which she had to choose between relinquishing her short-term disability claim and giving up her job. *See Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 298(7th Cir. 1998). However, by its own terms the letter did not require Manning to make such a choice. Rather, the letter communicated that she could still receive benefits for the time period between April 26 and August 31 if she either reported for work with a note from an Approved Health Care Provider certifying medical ability to work, or she did not report for

work and produced a note from an Approved Health Care Provider containing objective medical evidence supporting her short-term disability claim. According to ARIC's policy, obtaining a work release would not have prevented Manning from continuing to pursue her short-term disability claim. The record contains no direct evidence that ARIC ordered Manning to give up her past short-term disability benefits claim or risk termination. Additionally, section 510 does not prevent ARIC from implementing and executing legitimate business interests under ERISA, such as terminating an employee due to job abandonment or excessive absenteeism. *Id.* ("[S]ection 510 is not intended to prevent an employer from firing an employee due to excessive absenteeism which ultimately harms productivity, but to prevent that employer from discharging or harassing an employee with the specific intent of preventing the employee from obtaining vested pension rights.").

ARIC's request for a medical certification form does not constitute direct evidence of a section 510 violation, as such a request does not establish a causal link between the alleged discriminatory animus and the challenged decision denying benefits. *See Krensavage v. Bayer Corp.*, 314 Fed. Appx. 421, 426 (3d Cir. Jan. 22, 2008) (affirming summary judgment on a section 510 claim because "[t]he undisputed facts [were] that [the employee] did not receive medical clearance to return to work. . ."). Therefore, to have her section 510 claim survive summary judgment, Manning must establish a

prima facie case under the *McDonnell Douglas* framework.

To establish a prima facie case of ERISA retaliation, Manning must prove: (1)she participated in a statutorily protected activity (i.e., making a reasonable claim for ERISA benefits); (2) an adverse employment action was taken against her; and (3) a causal connection existed between her participation in a statutorily protected activity and an adverse employment action. *See Curby v. Solutia, Inc.*, 351 F.3d 868, 871 (8thCir. 2003). Here, it is undisputed that Manning has satisfied the first two elements, so she can establish a prima facie case of retaliation if she has demonstrated a causal connection between her application for ERISA benefits and her termination. *See Kinkead*, 49 F.3d at 456. A causal connection may be based upon circumstantial evidence. *Id.*

Manning cites the following as evidence showing the existence of a causal connection: (1) ARIC required a medical release from Manning's Approved HealthCare Provider before she could return to work; (2) this requirement was not pursuant to a written policy; and (3) ARIC's unwritten policy constitutes a post-hoc justification for termination. However, none of this demonstrates that ARIC terminated Manning's employment because she sought short-term disability benefits. As discussed above hat ARIC required Manning to obtain a work release prior to returning from a four-month absence is not evidence of ERISA retaliation. This was not an illegitimate requirement under the circumstances. Therefore, the district court properly

held that Manning failed to present a prima facie case of retaliation under section 510.

To establish a prima facie case of ERISA interference, Manning must show that(1) ARIC subjected her to an adverse employment action; (2) Manning was likely to receive future benefits; and (3) a causal connection existed between the adverse action and the likelihood of future benefits. *See Fischer v. Anderson Corp.*, 483 F.3d 553,556 (8th Cir. 2007). In order to establish a claim for interference with prospective benefits, Manning must prove that ARIC possessed "a specific intent to interfere" with her ERISA benefits. *See Pendleton v. QuikTrip Corp.*, 567 F.3d 988, 992 (8th Cir.2009) (citing *Register v. Honeywell Fed. Mfg. & Techs.*, LLC, 397 F.3d 1130, 1137(8th Cir. 2005)).

Manning admitted that she was ineligible for long-term disability benefits because she was released to return to work in October 2005. Because Manning was never eligible for long-term disability benefits, she cannot establish a prima facie case of ERISA interference. *See Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 792(7th Cir. 1999) (affirming summary judgment denying claim because plaintiff was not a member of the protected class for long-term disability benefits).

Assuming arguendo that Manning had presented a prima facie section 510 case, the *McDonnell Douglas* framework would require ARIC to provide a legitimate, nondiscriminatory reason supporting Manning's termination. *See Rath*, 978 F.2d at1089. As the reason for termination, ARIC

cited Manning's absenteeism for four months without any form of recognized leave. Absenteeism constitutes a legitimate, non-discriminatory reason for termination. *See Kinkead*, 49 F.3d at 456; *see also Godfrey v. BellSouth Telecommc'ns. Inc.*, 89 F.3d 755, 759 (11th Cir. 1996) (noting that "an employer may demand that an employee return to work after determining that the employee is not disabled, and then discipline the employee for unexcused absences").

Because ARIC provided a legitimate, non-discriminatory reason supporting Manning's termination, the burden would shift to Manning, under the *McDonnell Douglas* analysis, to demonstrate that ARIC's purported reason for her termination was pretextual. *See Pendleton*, 567 F.3d at 992. Manning failed to generate any genuine issue of material fact that ARIC's stated reasons for her termination were pretextual. Manning's assertion that ARIC retaliated or interfered is based solely on conjecture and undermined by the record. *See Jefferson v. Vickers, Inc.*, 102 F.3d960, 964 (8th Cir. 1997) (a plaintiff cannot prove an ERISA claim through "mere conjecture."). As a result, the district court properly held that ARIC's reason for terminating Manning's employment was not pretext for retaliation or interference under ERISA.

For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2625

Kim Iann Manning,

Plaintiff - Appellant

v.

American Republic Insurance Company,

Defendant - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:07-cv-00217-JEG)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 12, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

KIM IANN MANNING, Plaintiff, vs. AMERICAN REPUBLIC INSURANCE COMPANY, Defendant.	No. 4:07-cv-00217-JEG **ORDER**

This matter comes before the Court on a Motion for Partial Summary Judgment by Defendant American Republic Insurance Company (ARIC), which Plaintiff Kim Iann Manning (Manning) resists. The Court held a hearing on the matter on May 20, 2009. Manning was represented by Bruce and Andrew Stoltze. ARIC was represented by Thomas Foley. The matter is fully submitted and ready for disposition.

I. BACKGROUND

The Court's February 24, 2009, order affirming the ARIC plan administrator's decision denying Manning's application for short-term disability (STD) benefits contained a thorough recitation of the facts of this case (Clerk's No. 47 at 1-9). However, the Court will briefly summarize the specific material facts for Defendant's motion either as undisputed or "in the light most favorable to [Manning], as the nonmoving part[y]." *O'Brien v. Dep't of Agric.*, 532 F.3d805, 808 (8th Cir. 2008).

Manning began working at ARIC on January 31, 2005, and was covered under ARIC's medical and disability plan (the Plan), including STD benefits. Manning took a medical leave of absence on April 26, 2005, and applied for STD benefits on May 5, 2005. Manning corresponded with ARIC representatives between May and August 2005 about Manning's STD claim, addressing whether Manning had consulted an "Approved Health Care Provider" under the Plan and whether she had presented "objective medical evidence" as both these terms are defined by ARIC's STD Plan. On July 25, 2005, ARIC sent Dr. Kenneth Moon (Dr. Moon), Manning's physician and an approved health care provider, a letter stating, "Please note, that your patient's continued employment is dependent upon us receiving clarification of her condition from you." Pl. SUF ¶ 14; Def. App. 125. On July 29, 2005, Jodi Lanipher (Lanipher), an ARIC human resources employee, prepared notes of her telephone conversation with Dr. Moon. Lanipher's notes state that "[i]f [Manning] plans to return to work next week and is o.k. with her STD claim as it stands now then she doesn't need to set up an [appointment] with Dr. Moon." Def. App.127. On August 1, 2005, Dr. Moon adopted the recommendation of physician's assistant Andra Kennedy that Manning could not return to work until September 2005. On August 6, 2005, Dr. Moon faxed his medical notes to ARIC.

On August 8, 2005, ARIC sent a letter to Manning denying her STD claim stating that, if Manning did not return to work by August 15, 2005,

"[ARIC's] records will be noted to reflect that you have abandoned your position with [ARIC]. . . ." Pl. SUF ¶ 23; Def. App. 144. The August 8 letter did not mention that Manning was required to bring a work release when she reported for work. Manning appealed ARIC's decision on August 12, 2005, but reported to work on August 15, 2005, consistent with ARIC's August 8 letter; however, ARIC sent Manning home for failure to provide medical certification that Manning was able to return to work. ARIC had a general unwritten policy that all employees must obtain medical certification before returning to work in order to assure that ARIC would not have liability if Manning's health condition resulted in further complications at work.[1] There is no evidence in the record that ARIC ever varied from this unwritten policy for any employee.

ARIC affirmed its denial of STD benefits on August 29, 2005, stating it lacked objective medical evidence to support her STD claim. ARIC's August 29 letter to Manning explained that Manning had two options:

> 1. Return to work on Wednesday, August [31], with certification from your [A]pproved Health Care Provider that you are able to return to work.
>
> 2. Provide us with *objective* medical

[1] The ARIC STD benefits plan included a written policy requiring such a medical certification upon return from STD, see discussion *infra*; but since STD was denied, the more general procedure is implicated.

> information, from your [A]pproved HealthCare Provider, that you are disabled from performing your job duties.

Def. App. 149 (emphasis in original).

ARIC's STD benefits plan states that "[a] decision on STD eligibility will not be made until objective medical evidence to support [the] disability is received by the enterprise." Def. App. 97. The STD benefits plan further states that any employee returning to work following a leave due to a "Medically Certified Health Condition" must provide a statement from an approved health care provider releasing him or her to return to work, with or without restrictions, before the employee is allowed to return to active employment. As noted, independent of ARIC's STD Plan, ARIC has a general policy requiring certification from an approved healthcare provider medically clearing an employee to return to work after that employee has taken an extended leave of absence based on medical reasons. On August 30, 2005, Manning informed ARIC that she had an appointment with Dr. Moon for the morning of August 31, 2005. Manning went to her appointment with Dr. Moon, who did not release her for work at that time and extended her disability period for an additional month. On September 6, 2005, ARIC sent Manning a letter stating that ARIC was terminating her employment effective August 31, 2005. Under ARIC's STD Plan, terminated employees are not eligible for STD benefits.

Manning was released to return to work without any restrictions in October 2005. Manning never applied for long-term disability (LTD) benefits from ARIC. Manning would not have been eligible for LTD benefits if she had remained employed with ARIC because the six-month STD period would not have expired by October 2005. Manning filed this action, bringing (1) a claim for judicial review of ARIC's denial of her STD benefits under the Employee Retirement Income Security Act (ERISA), pursuant to 29U.S.C. § 1132(a)(1)(B) (Count One); (2) an ERISA retaliation claim asserting ARIC terminated Manning based on her application for STD benefits, pursuant to 29 U.S.C. § 1140 (Count Two);and (3) a claim that ARIC's wrongful termination prevented her from obtaining future rights and benefits under ARIC's LTD benefits plan (Count Three). The Court resolved Count One and affirmed ARIC's denial of Manning's STD application in a previous order on February 24, 2009(Clerk's No. 47). Defendant filed this Partial Motion for Summary Judgment on Counts Two and Three of Manning's complaint, arguing no genuine issues of material fact remain for trial and it is entitled to judgment as a matter of law. Manning resists.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment must be granted if the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to

judgment as a matter of law." Fed. R. Civ.P. 56(c); *Walnut Grove Partners, L.P. v. Am. Fam. Mut. Ins. Co.*, 479 F.3d 949, 951-52 (8th Cir.2007). "In considering a motion for summary judgment the court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue." *Thomas v.Corwin*, 483 F.3d 516, 526-27 (8th Cir. 2007). Rather, the Court focuses "on whether a genuine issue of material fact exists for trial – an issue of material fact is genuine if the evidence is sufficient to allow a reasonable jury verdict for the nonmoving party." *Morris v. City of Chillicothe*,512 F.3d 1013, 1018 (8th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986)).

The party seeking summary judgment initially bears the burden of demonstrating the absence of any genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 1986); *Anderson*, 477 U.S. at 248. If the moving party satisfies its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "The mere existence of some alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48. An

issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. The substantive law determines what facts are material; "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at248; *Wells Fargo Fin. Leasing, Inc. V. LMT Fette, Inc.*, 382 F.3d 852, 856 (8th Cir. 2004). "Mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment." *Menz v. NewHolland N. Am., Inc.*, 507 F.3d 1107, 1110 (8th Cir. 2007) (quoting *Thomas*, 483 F.3d at 527.

B. ERISA Retaliation Claim (Count Two)

Section 510 of ERISA makes it unlawful for an employer to discharge a participant in an employee benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. While Manning's complaint appears to present Count Two as an ERISA interference claim, in resisting ARIC's Motion for Summary Judgment, Manning argues Count Two is instead an ERISA retaliation claim. Manning can establish ERISA-based retaliation through direct evidence, or in the absence of direct evidence of an employer's deliberate interference with STD benefits, the Court analyzes § 510 interference claims using the

McDonnell Douglas[2] three-part burden-shifting analysis common to Title VII and ADEA cases. *See Texas Dep't of Cmty. Affairs v. Burdine*,450 U.S. 248 (1981); *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1035 n.7 (8th Cir.2007) (holding because "[the plaintiff's] ERISA claim is based on alleged circumstantial evidence . . . [the Eighth Circuit analyzed the claim] under the *McDonnell Douglas* framework").

1. Direct Evidence

Manning may produce direct evidence of discrimination, which is "evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Russell v. Kansas City, Mo.*, 414 F.3d 863, 866 (8th Cir.2005). "If there is direct evidence of . . . discrimination, the burden rests with the employer to show that it more likely than not would have made the same decision without consideration of the illegitimate factor." *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1046 (8th Cir. 2005)(citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)). The employee "may proceed under *Price Waterhouse* if she produces direct evidence of conduct or statements by persons involved in the decision-making process, which indicate a discriminatory attitude was more likely than not a

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[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

motivating factor in the employer's decision." *Kratzer*, 398 F.3d at 1045-46.

Manning argues ARIC's August 29 letter is direct evidence that ARIC terminated Manning's employment because of her application for STD benefits. Manning argues that ARIC presented her a "Hobson's choice":[3] Manning could either present objective medical evidence supporting her STD benefits claim or obtain a medical certification from her doctor relinquishing her STD benefits claim. Manning argues that other circuits have considered such a Hobson's choice as direct evidence supporting a Section 510 claim. See *Lindemann v. Mobil Oil Corp.*,141 F.3d 290, 298 (7th Cir. 1998) (holding that a "company policy which forced an employee to choose between losing his job for the exercise of his rights under ERISA-protected benefits or keeping his job and forcing him to give up his benefits would be essentially unfair or 'a quintessential Hobson's choice'" was direct evidence supporting a Section 510 claim (citing *Kowalski v. L & F Prods.*, 82 F.3d 1283, 1288 (3d Cir. 1996)). The record herein does not support Manning's position.

The August 29 letter, by its own terms, does not demand Manning relinquish her STD benefits claim and return to work or face termination. Rather, the August 29 letter communicates that Manning could still receive STD benefits for the time

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[3] A "Hobson's choice" is defined as "something one must accept through want of any real alternative." *United States v. Blum*. 65 F.3d 1436, 1442 (8th Cir. 1995) (quoting Webster's Third Int'l Dictionary (3d ed. 1971)).

period between April 26 and August 31 whether (1) she reported for work with a note from an approved health care provider certifying that she can medically work or (2) she did not report for work and produced a note from an approved health care provider containing objective medical evidence supporting her STD claim. If Manning provided objective medical evidence from her approved health care provider, Manning would be entitled to STD benefits beginning on April 26 until her approved health care provider permitted Manning to return to work. Just as the court in *Lindemann* concluded there was no Hobson's choice, this Court similarly concludes "it is obvious that [the employer] never ordered [the employee] to give up her short-term disability benefits or risk being fired." *Lindemann*, 141 F.3d at 298. *Lindemann* acknowledges that Section 510 does not prevent an employer from implementing and executing legitimate business interests under ERISA. *Id.* ("[S]ection 510 is not intended to prevent an employer from firing an employee due to excessive absenteeism which ultimately harms productivity, but to prevent that employer from discharging or harassing an employee with the specific intent of preventing the employee from obtaining vested pension rights." (internal quotations omitted)).

ARIC has an unwritten general policy requiring certification from a medical doctor that an employee who has taken an extended medical leave of absence is medically able to resume work. Manning concedes that employers routinely require employees to submit medical certifications after

lengthy absences. The request for a medical certification form does not establish a causal link between the alleged discriminatory animus — retaliation against Manning for claiming STD benefits — and the challenged decision — ARIC's termination of Manning's employment when she failed to submit a medical-certification form permitting her to resume work. An employer's requirement that an employee provide a medical certification form as a condition of returning to work does not reflect a discriminatory animus contemplated under Section 510. *See Krensavage v. Bayer Corp.*, No. 06-4302, 2008 WL 177802, at *4 (3d Cir. Jan. 22, 2008) (unpublished decision) (affirming summary judgment on a Section 510 claim because "the undisputed facts[were] that [the employee] did not receive medical clearance to return to work. . ."); *Mundale v.Lockheed Martin Corp.*, No. 8:08-cv-217, 2009 WL 179632, at *4 (M.D. Fla. Jan. 26, 2009)("Mundale was not terminated until after Cigna denied her request for short-term disability benefits and she refused to return to work or provide medical documentation excusing her from work. . . . [Therefore] Mundale's claim fails because she has not established a prima facie case of unlawful termination under Section 510."); *Pough v. SBC Commc'ns, Inc.*, 570 F. Supp. 2d1006, 1019 (N.D. Ill. 2008) (granting summary judgment on a Section 510 claim was proper, in part, because the employee "fail[ed] to . . . [submit] either a medical release or further documentation of her need to remain on medical leave").

The fact that the policy was unwritten does not change the Court's analysis as long as the policy is applied to all employees. The Eighth Circuit has held that (1) unwritten policies are permissible in the workplace, and (2) even if the employer deviates from its unwritten policy, the employee must prove that the deviation from the unwritten policy occurred on account of a discriminatory reason. *See Chock v. Nw. Airlines, Inc.*, 113 F.3d 861, 864-65 (8th Cir. 1997) (affirming summary judgment in the employer's favor where the employee presented no evidence that the employer's deviation from its established promotion policies occurred due to racial discrimination). Here, since ARIC's medical certification requirement does not violate Section 510,[4] ARIC's requirement that Manning produce this certification is not direct evidence that ARIC violated Section 510.[5] In the absence of some

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[4] Lanipher's July 25 notes do not change the Court's analysis. Therein, Lanipher informed Manning that "[i]f [Manning] plans to return to work next week and is o.k. with her STD claim as it stands now then she doesn't need to set up an [appointment] with Dr. Moon." (Def. App. 127) Lanipher's notes simply indicate that if Manning wanted to receive STD benefits, she needed to make an appointment with Dr. Moon to obtain objective medical evidence supporting her STD claim. Nothing in Lanipher's notes generates a factual issue that Manning would be exempted from ARIC's general medical certification requirement if she had been willing to relinquish her STD claim.

[5] Manning argues this Hobsen's choice informs the *McDonnell Douglas* analysis as well. Both positions cannot be maintained. If the medical certification requirement is permitted under ERISA, Manning did not comply with that requirement, and ARIC's disability determination was made in good faith, then as a matter of law Manning cannot establish that ARIC's

improper deviation from ARIC's unwritten medical work release policy permitted under ERISA, Manning has provided no "evidence showing a specific link between the alleged discriminatory animus and the challenged decision sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Russell*, 414 F.3d at 866, quoting *Griffith v.City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004). Thus, the Court is unable to find direct evidence of discrimination on this record.

2. *McDonnell Douglas* Framework

If Manning cannot present direct evidence supporting retaliation under Section 510, then the *McDonnell Douglas* burden-shifting framework controls the claim. A prima facie Section 510 interference claim requires Manning to show that (1) ARIC subjected Manning to an adverse employment action, (2) Manning was engaged in a protected activity by applying for ERISA-protected benefits, and (3) there was a causal connection between the adverse employment action and the participation in the statutorily protected activity. *Fischer v. Andersen Corp.*, 483 F.3d553, 556 (8th Cir. 2007);

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legitimate, nondiscriminatory reason was pretextual. *See, e.g., Godfrey v. BellSouth Telecoms.*, 89 F.3d 755, 759 (11th Cir. 1996) ("[A]n employer may demand that an employee return to work after determining that the employee is not disabled, and then discipline that employee for unexcused absences. The employer does not violate ERISA Section 510 just because a court later determines that the employer's good faith disability determination was wrong.")

Montgomery v. John Deere & Co., 169 F.3d 556, 561 (8th Cir. 1999); *Kinkead v. Sw. Bell Tel. Co.*, 49 F.3d 454, 457 (8th Cir. 1995). That done, the burden shifts to ARIC to articulate a legitimate, nondiscriminatory reason for the termination. *Fitzgerald v.Action, Inc.*, 521 F.3d 867, 871 (8th Cir. 2008). If ARIC does so, the burden shifts back to Manning to prove the proffered reason was pretextual. *Id.*

ARIC does not dispute for purposes of this Motion that Manning can establish the first two elements of the prima facie case. ARIC does argue, however, that (1) there was no causal connection between the adverse action and her application for ERISA-protected STD benefits, and(2) even if Manning presents a prima facie case under Section 510, ARIC had a legitimate and nondiscriminatory reason for terminating Manning's employment.

a. Causal Connection Element of Prima Facie Case

Manning can establish a prima facie case of interference with insurance benefits under Section 510 if she demonstrates a causal connection between her application for ERISA-protected STD benefits and her termination. *Kinkead*, 49 F.3d at 457. "[T]he kind of causal connection required for a prima facie case is not 'but for' causation, but rather, a showing that an employer's 'retaliatory motive played a part in the adverse employment action.'" *McBurney v.Stew Hansen's Dodge City, Inc.*, 398 F.3d 998, 1003 (8th Cir. 2005) (quoting *Kipp v.*

Miss.Highway & Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002)) (FMLA case). Manning's burden "is not onerous and the showing need not be made by a preponderance of the evidence." *Wallace v. Sparks Health Sys.*, 415 F.3d 853, 860 (8th Cir. 2005).

Manning seeks a retaliatory motive contending that Patricia Anderson, an ARIC human resources employee, "has testified that her requirement was specifically that Manning was required to obtain from [Dr. Moon], and no other, either a release to return to work or objective medical evidence to justify inability to perform her job duties." Pl. Resp. Br. at 13. Manning argues this creates a causal connection between ARIC's denial of STD benefits and Manning's termination because, while under the STD benefits plan Manning could have seen any approved health care provider, Anderson interpreted the plan to include only Dr. Moon, who had already made a disability determination and could not clear Manning to return to work. The record does not support Manning's interpretation that ARIC precluded Manning from visiting another approved health care provider. At her deposition, Manning's counsel asked Anderson, "And she's required to return to work then – says required to return to work with certification from Dr. Moon that she's able to return to work?," and Anderson responded simply, "Yes." Pl. App. 23. This testimony is not sufficiently direct to provide the factual basis for the argument Manning now asserts. The question did not ask whether Dr. Moon was the only approved health care provider that Manning

could have asked for a work release, which would establish Manning's prima facie case. This colloquy between Manning's counsel and Anderson does not establish the necessary causal connection between Manning's STD application and her termination because it does not establish that ARIC deviated from their medical certification policy.

Manning further argues that ARIC required a work release when ARIC produced no policy requiring such a release and that Anderson relied on the STD policy provision for requiring an approved health care provider to certify that the employee's medically certified health condition no longer impairs the employee from working. Manning asserts that reliance on such a policy is evidence of an improper motive. The record does not support this assertion. Anderson's deposition relies on a more general company policy applying to anyone — irrespective of whether they applied for ERISA benefits — before returning to work. An unwritten work release policy does not demonstrate any impermissible motive; rather, only unwritten policies that are not consistently applied constitute evidence of an impermissible motive required for a prima facie case. *See Chock*, 113 F.3d at 864-65 (holding that an employer's unwritten employment policy does not demonstrate an impermissible discriminatory motive). ARIC's general medical certification policy, which includes both ERISA-based medical absences and non-ERISA-based medical absences, as a matter of law cannot support a causal connection between Manning's termination and her application for STD benefits.

Manning also argues that ARIC's request that Manning produce a medical certification that she could return to work would require Manning to return to work against Dr. Moon's opinion, thus demonstrating ARIC's intent to discriminate against her. However, this claim is not actionable under ERISA because it does not violate any provisions of ARIC's STD Plan. *See Koons v. Aventis Pharm., Inc.*, 367 F.3d 768, 776 (8th Cir. 2004) ("ERISA . . . is not a mechanism through which general claims of wrongful termination can be brought.").

Lastly, Manning argues ARIC's request for the medical certification form establishes the requisite causal connection between Manning's application for STD benefits and ARIC's termination because it was a post hoc reason. *See Kobrin v. Univ. of Minn.*, 34 F.3d 698, 703(8th Cir. 1994). Although the August 29 letter does not provide the basis of ARIC's general medical certification policy, that does not support an inference that any attempted explanation of that policy would be a post hoc reason that would support an inference of discrimination. Anderson's proffered reason for ARIC's general medical certification policy was that it protects the employees from returning to work for financial reasons even though it is possible that a non-qualifying medical disability could worsen by returning to work. Other than being an unwritten policy, as discussed above, no fact issue has been generated on this record to suggest the policy was manufactured in response to this claim.

ARIC's general medical certification policy is a common means both to protect ARIC from potential

liability and to protect ARIC's employees from on-the-job injuries that could result from their medically unauthorized premature return to work. *See Johnson v. Univ. of Iowa*, 431F.3d 325, 329-30 (8th Cir. 2005) (noting that medical release policies are presumptively reason-able unless applied in a discriminatory manner). The facts that (1) ARIC required a work release form from a doctor before returning to work, and (2) ARIC's STD Plan required objective medical evidence to qualify for benefits are not inconsistent. Accordingly, the Court concludes that Manning has failed to show a causal connection between Manning's termination and ARIC's denial of Manning's STD benefits. Therefore Manning has failed to present a prima facie case of retaliation under Section 510.

b. Non-Discriminatory Reason and Pretext

Assuming arguendo Manning had presented a prima facie Section 510 retaliation case,[6] the *McDonnell Douglas* burden-shifting framework requires ARIC to provide a legitimate, nondiscriminatory reason supporting Manning's termination. *See Fitzgerald*, 521 F.3d at

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[6] The Eighth Circuit has permitted Court's to proceed to the pretext inquiry even when the Court concludes the plaintiff has not presented a prima facie under Section 510. *See Rath v. Selection Research, Inc.*, 978 F2d 1087, 1090 (8th Cir. 1992) ("[The Eighth Circuit] doubt[s] that [the employee] has established a prima facie case of retaliation. However, [the employee's] failure of proof is even more obvious if we focus upon the third or pretext stage of the *McDonnell Douglas* inquiry.").

871(describing the second prong of McDonnell Douglas burden-shifting analysis). ARIC's stated reason for terminating Manning's employment after denying Manning's appeal was Manning's failure to submit a work release form, which resulted in Manning being ineligible to work and thus caused her to accrue three unexcused absences. *Godfrey*, 89 F.3d at 759 (holding that after the employer determined the employee was not disabled, the employer had a legitimate, nondiscriminatory reason to terminate the employee for unexcused absences under Section 510). This is a valid, non-discriminatory reason supporting Manning's termination.

Since ARIC has rebutted the inference of discrimination arising from Manning's prima facie case, the burden shifts to Manning to prove ARIC's articulated justification is merely pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Fitzgerald*, 521 F.3d at 872 (quoting *Gavalik v. Cont'l Can Co.*, 812F.2d 834, 853 (3d Cir. 1987). In determining whether summary judgment is appropriate, the Court must consider "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Girten v. McRentals, Inc.*, 337 F.3d 979, 982 (8th Cir. 2003) (quoting *Reeves v.Sanderson*

Plumbing Prods., 530 U.S. 133, 148-89 (2000)). "An employee may prove pretext by demonstrating that the employer's proffered reason has no basis in fact, that the employee received a favorable review shortly before he was terminated, that similarly situated employees who did not engage in the protected activity were more leniently treated, that the employer changed its explanation for why it fired the employee, or that the employer deviated from its policies." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006). Manning cannot rely on "mere conjecture" but must present evidence of specific intent to interfere with his rights. *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 964 (8th Cir. 1996); see also 29 U.S.C. § 1140 (stating that ERISA prohibits taking certain actions "for the purpose of interfering with the attainment of any right . . . ."). "This specific intent is present where the employee's (future or present) entitlement to protected benefits is a motivating factor in the employer's decision." *Koons*, 367F.3d 768, 777 (8th Cir. 2004). A motivating factor is one that has "a determinative influence on the outcome." *Id.* (quoting *Reeves*, 530 U.S. at 141).

Manning argues ARIC's stated reason for terminating Manning is pretextual because ARIC's actual reason for terminating was her failure to provide a valid work release form from an approved health care provider, not "job abandonment" as stated in the August 8 letter. The August 29 letter clearly informs Manning that (1) she was not eligible for FMLA time because she had been an ARIC employee for less than twelve months, (2) she had

exhausted her remedies regarding her STD application, and (3) she had three days to return to work or she would be terminated under the voluntary termination policy. ARIC's attendance policy treats excused medically-related absences as one occurrence. As applied to Manning, ARIC treated Manning's excused medical-absences between April 29 and August 28 as one occurrence. Once ARIC has determined that an absence is not excused, then each day the employee is absent counts as one occurrence. As applied to Manning, once ARIC determined Manning was not eligible for STD benefits, Manning had three days to report to work or she would be considered voluntarily terminated under ARIC's attendance policy. While Manning had been in contact with ARIC, ARIC would not excuse any additional absences unless Manning provided ARIC with (1) objective medical evidence supporting her disability or (2) a work release from an approved health care provider supporting her ability to return to work. On August 31, when Manning did not report for work for a third consecutive day, Manning was considered voluntarily terminated under ARIC's attendance plan. Although the Court finds no authority in the Eighth Circuit on point, persuasive authority supports ARIC's position that, in the absence of other evidence of pretext, the fact that ARIC applied a uniform medical certification policy to an employee and terminated a non-complying employee does not satisfy Manning's burden of proving pretext. *See, e.g., Walsh v. United Parcel Service*, 201 F.3d 718, 729-30 (6th Cir. 2000) (employee was lawfully terminated because of failure to respond to

employer's requests for medical information necessary to demonstrate entitlement to medical leave, not to avoid paying disability benefits);*Godfrey*, 89 F.3d at 759 (holding that an employer who has determined that the employee had not been under a disability can discipline that employee for subsequent unexcused absences and not violate Section 510); *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 41-42 (1st Cir. 1995) (holding that the employer's determination that the employee's doctor did not provide a valid certification of disability was permissible; the employer could require that employee to return to work under Section 510; and that "[e]ven if [the employer] was mistaken in its evaluation of [the employee's] disability, as long as that determination was in good faith and formed the basis of the decision it is permissible under section 510"); *Hendricks v Edgewater Steel Co.*, 898 F.2d385, 389-90 (3d Cir. 1990) (rejecting the employee's attempt to show pretext under Section 510 because the employee "was terminated . . . after failing to . . . indicat[e] his intent, in writing, to return to work when called"). Even if ARIC applied its medical work release policy inconsistently, which this record does not support, that still does not demonstrate pretext by itself under *McDonnell Douglas*. *Koons*, 367 F.3d at 779 ("To the extent [the employer] may have acted inconsistently in disciplining its employees, this does not prove an intent to interfere with his severance benefits. At most, . . . it is merely some evidence of an unlawful motive. . . ."). Manning has provided no evidence supporting any of the legally-established methods for rebutting ARIC's stated legitimate and

nondiscriminatory reason for terminating Manning to establish that ARIC's proferred reason was pretextual under Section 510. *See Stallings*, 447F.3d at 1052.

The Court concludes that assuming arguendo Manning had established a prima facie case of ERISA retaliation under Section 510 using the *McDonnell Douglas* burden-shifting framework, Manning failed to generate any fact issue that ARIC's proffered reason was pretextual.

C. Interference with Future Benefits (Count Three)

To prevail under her ERISA interference claim, Manning must show that (1) ARIC subjected her to an adverse employment action, (2) Manning was likely to receive future benefits, and (3) there was a causal connection between the adverse action and the likelihood of future benefits. *See Fischer*, 483 F.3d at 556. To establish a claim for interference with current or prospective benefits under Section 510, Manning must show ARIC "had a specific intent to interfere with [her insurance] benefits, but that may be shown by circumstantial evidence." *Register v. Honeywell Fed. Mfg. & Techs., LLC*, 397 F.3d 1130, 1136-37 (8th Cir. 2005) (citing *Regel v. K-Mart Corp.*, 190 F.3d 876, 881 (8th Cir. 1999)).

Manning has admitted that she was ineligible for LTD benefits because she was released to return to work in October 2005. Manning also admitted that the six-month STD benefits period could not

have expired by the time she became eligible for LTD benefits. The Seventh Circuit, under almost identical facts, persuasively rejected an employee's claim for interference with prospective LTD benefits, saying,

> To receive the long-term disability benefits that [the employee] sought under her insurance policy, she must have been "totally disabled," as defined by her insurance policy, for the duration of a ninety-day elimination period. Measured from her first day of disability on November 4, 1994, [the employee] would have been disabled for ninety days, and therefore become entitled to long-term disability benefits, on February 3, 1995. Fatal for her claim, [the employee's doctors] issued letters that authorized her return to work in December and January, before the ninety-day period lapsed.
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> [The employee] appears to believe that her termination preempted the tolling of the ninety-day period for qualification, but the doctors' releases made her ineligible for long-term disability benefits well before then. [The employee's]termination and [the employer's] motivation for the termination are simply irrelevant. [The employee] cannot establish a prima facie case under § 510 of ERISA because she was not a member of the protected class for long-term disability benefits. The district court did not err in granting summary judgment.

Feldman v. Am. Mem'l Life Ins. Co., 196 F.3d 783, 792 (7th Cir. 1999).

The Court agrees with *Feldman*'s reasoning. Manning concedes that she could not have been eligible for LTD benefits because she obtained a release to return to work before the six-month STD period had lapsed, and the Court concludes Manning's LTD interference claim fails as a matter of law. Accordingly, Manning cannot establish a prima facie Section 510 case for interference with LTD benefits because Manning cannot establish that she could have received LTD benefits, let alone was "likely to receive future benefits." *See Fischer*, 483 F.3d at 556. Manning has cited no authority to support a Section 510 claim based solely on an employee's own speculation about her future employment possibilities with her employer. In contrast, ERISA's public policy supports limiting relief under Section 510 to plaintiffs who can establish clearly ascertainable damages which are foreseeable. *See Howe v. Varity Corp.*, 36 F.3d 746,756-57 (8th Cir. 1994) (holding that ERISA provides relief only for clearly ascertainable damages with the intent to make plaintiffs whole, which precludes recovery for speculative future harm). The number of possible situations that could have affected Manning's employment with ARIC between August 2005, when Manning was denied STD benefits, and December2006, when Manning was approved for social security benefits, renders unforeseeable any damages Manning could recover under Section 510. *See Feldman*, 196 F.3d at 792. Because Manning was never eligible for LTD

benefits, her LTD benefits interference claim fails as a matter of law.[7]

III. CONCLUSION

Viewing the evidence in the light most favorable to Manning, and in the absence of any genuine issues of material fact, Manning's ERISA claims fail as a matter of law. Therefore, ARIC's Motion for Partial Summary Judgment (Clerk's No. 46) must be granted as to Counts Two and Three. Manning's case is hereby **dismissed**. The Clerk of Court is directed to enter judgment for the Defendant and against the Plaintiff.

IT IS SO ORDERED.

Dated this 19th day of June, 2009.

/S/ James E. Gritzner
JAMES E. GRITZNER,
JUDGE

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[7] To the extent that Counts Two or Three assert that ARIC interfered with Manning's ability to receive additional STD benefits, the Court's February 24, 009, order concluding ARIC acted in good faith precludes a finding that ARIC acted with the specific intent to interfere with Manning's STD benefits. *See Godfrey*. 89 F.3d at 759 (holding that an employer's good faith determination that an employee was not disabled prevented, as a matter of law, a finding that the employer acted pretextually). Additionally, the Court's conclusion regarding Count Two that ARIC did not retaliate against Manning based on her application for STD benefits precludes Manning's argument that ARIC has the specific intent to interfere with Manning's application for additional STD benefits.

UNITED STATES
DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2625

Kim Iann Manning,

Appellant

v.

American Republic Insurance Company,

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:07-cv-00217-JEG)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by panel is also denied.

June 17, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans